No. 94-873

FILED
MAR 6 1995

# In the Supreme Court of the United States

OCTOBER TERM, 1994

---

WILLIAM E. FOSTER, PETITIONER

*v.*

FREEMAN UNITED COAL MINING COMPANY, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

---

## BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

---

DREW S. DAYS, III
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 514-2217*

THOMAS S. WILLIAMSON, JR.
*Solicitor of Labor*

ALLEN H. FELDMAN
*Associate Solicitor*

STEVEN J. MANDEL
*Deputy Associate Solicitor*

ELLEN L. BEARD
*Attorney*
*Department of Labor*
*Washington, D.C. 20210*

BEST AVAILABLE COPY

## QUESTION PRESENTED

Whether regulations applicable to claims filed before April 1, 1980, under the Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*, permit an employer to rebut the presumption of eligibility for benefits under those regulations by proving that the claimant was not disabled by pneumoconiosis.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statement | 2 |
| Argument | 7 |
| Conclusion | 13 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Cort* v. *Director, OWCP*, 996 F.2d 1549 (3d Cir. 1993) | 11 |
| *Gibas* v. *Saginaw Mining Co.*, 748 F.2d 1112 (6th Cir. 1984) | 11 |
| *Grigg* v. *Director, OWCP*, 28 F.3d 416 (4th Cir. 1994) | 10, 11 |
| *Jewel Smokeless Coal Corp.* v. *Street*, 42 F.3d 241 (4th Cir. 1994) | 9 |
| *Kertesz* v . *Crescent Hills Coal Co.*, 788 F.2d 158 (3d Cir. 1986) | 11 |
| *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135 (1987) | 2, 3, 8, 12 |
| *Oravitz* v. *Director, OWCP*, 843 F.2d 738 (3d Cir. 1988) | 10, 11 |
| *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680 (1991) | 8 |
| *Peabody Coal Co.* v. *Vigna*, 22 F.3d 1388 (7th Cir. 1994) | 9 |
| *Pittston Coal Group* v. *Sebben*, 488 U.S. 105 (1988) | 8 |
| *Ramey* v. *Kentland Ekhorn Coal Corp.*, 755 F.2d 485 (6th Cir. 1985) | 11 |
| *Robbins* v. *Jim Walter Resources, Inc.*, 898 F.2d 1478 (11th Cir. 1990) | 6, 10, 11 |
| *Sykes* v. *Director, OWCP*, 812 F.2d 890 (4th Cir. 1987) | 6, 10 |
| *Sykes* v. *Itmann Coal Co.*, 2 Black Lung Rep. (MB) 1-1089 (Ben. Rev. Bd. 1980), rev'd *sub nom. Sykes* v. *Director, OWCP*, 812 F.2d 890 (4th Cir. 1987) | 9, 10 |

Cases—Continued: Page

*Twin Pines Coal Co.* v. *United States Dep't of Labor*, 854 F.2d 1212 (10th Cir. 1988) ..... 9
*Wetherill* v. *Director, OWCP*, 812 F.2d 376 (7th Cir. 1987) ..... 4
*York* v. *Benefits Review Bd.*, 819 F.2d 134 (6th Cir. 1987) ..... 6, 10
*Youghiogheny & Ohio Coal Co.* v. *McAngues*, 996 F.2d 130 (6th Cir. 1987), cert. denied, 114 S. Ct. 683 (1994) ..... 9

Statutes, regulations and rule:

Black Lung Benefits Act, 30 U.S.C. 901 *et seq.* ..... 2
30 U.S.C. 901(a) ..... 2
30 U.S.C. 901(f)(1) ..... 2
30 U.S.C. 901(f)(1)(A) ..... 2, 7
30 U.S.C. 902(b) ..... 2
30 U.S.C. 921(a) ..... 10
30 U.S.C. 931(a) ..... 10
30 U.S.C. 932(a) ..... 10
30 U.S.C. 932(k) ..... 7
Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, § 2(c), 92 Stat. 95 ..... 8
20 C.F.R.:
Pt. 410:
Section 410.412 ..... 6
Section 410.412(a)(1) ..... 9
Pt. 701:
Section 701.202(f) ..... 7
Pt. 718:
Section 718.204(c) ..... 12
Pt. 727 ..... 2
Section 727.203(a) ..... 7
Section 727.203(a)(1) ..... 3, 5
Section 727.203(a)(1)-(4) ..... 2
Section 727.203(b) ..... 5, 7
Section 727.203(b)(1) ..... 5
Section 727.203(b)(1)-(4) ..... 3
Section 727.203(b)(2) ..... 3, 4, 5, 6, 9, 10, 11, 12

Statutes, regulations and rule—Continued: Page

Section 727.203(b)(3) ..... 4, 10, 11, 12
Section 727.203(b)(4) ..... 5
Pt. 802:
Section 802.410(b) ..... 7
Sup. Ct. R. 12.4 ..... 7

# In the Supreme Court of the United States

OCTOBER TERM, 1994

---

No. 94-873

WILLIAM E. FOSTER, PETITIONER

*v.*

FREEMAN UNITED COAL MINING COMPANY, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

---

## BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

---

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 30 F.3d 834. The decisions of the Benefits Review Board (Pet. App. C1-C5, D1-D6) and the administrative law judge (Pet. App. E1-E6, F1-F8) are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on July 18, 1994. A petition for rehearing was denied on August 22, 1994. Pet. App. B1. The petition for a writ of certiorari was filed on November 15, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The Black Lung Benefits Act (BLBA), 30 U.S.C. 901 *et seq.*, provides benefits to former coal miners or their survivors for total disability or death due to pneumoconiosis arising out of coal mine employment. See 30 U.S.C. 901(a). The Act defines "pneumoconiosis" as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment," 30 U.S.C. 902(b), and it directs the Secretary of Labor to promulgate regulations defining compensable "total disability" under the Act. 30 U.S.C. 902(f)(1). The BLBA requires the regulations to provide that a living miner "shall be considered totally disabled when pneumoconiosis prevents him or her from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity and over a substantial period of time." 30 U.S.C. 902(f)(1)(A).

The so-called "interim regulations" applicable to this case appear at 20 C.F.R. Pt. 727. They generally govern claims filed after June 30, 1973, but before April 1, 1980. See generally *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 138-139 (1987). Under the interim regulations, a claimant who worked mining coal for at least ten years can establish a rebuttable presumption (known as the "interim presumption") of total disability due to pneumoconiosis arising out of his mining employment in any of four ways: through x-ray or biopsy evidence of pneumoconiosis, through pulmonary function tests, through blood gas tests, or through other medical evidence (typically a doctor's opinion) establishing the presence of a totally disabling respiratory or pulmonary condition. 20 C.F.R. 727.203(a)(1)-(4) (reproduced at Pet.

App. A2-A3). The party opposing benefits may then rebut the interim presumption by establishing any of four contrary facts: that the claimant is actually performing his usual or comparable work, that he is able to do such work, that his total disability did not arise in whole or in part out of coal mine employment, or that he does not in fact have pneumoconiosis. 20 C.F.R. 727.203(b)(1)-(4) (reproduced at Pet. 2-3; Pet. App. A3); see *Mullins Coal*, 484 U.S. at 141-144. This case involves the second ground for rebuttal: that "the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title)." 20 C.F.R. 727.203(b)(2).

2. Petitioner worked in underground coal mines for 26 years. In 1972, he suffered a back injury on the job. Despite several attempts to return to work, his back condition prevented him from performing either his previous job or other jobs in the mine. He stopped working in 1975, and he applied for black lung benefits in 1977. Pet. App. A5, E2-E3. The administrative law judge (ALJ) found that petitioner "quit his coal mine employment because of his back injury." *Id.* at E3. The ALJ determined that petitioner had invoked the interim presumption under 20 C.F.R. 727.203(a)(1) by presenting sufficient x-ray evidence of simple pneumoconiosis. Pet. App. E3-E4. The ALJ held, however, that an employer may rebut the presumption, under Section 727.203(b)(2), by showing that the claimant did not have a totally disabling respiratory or pulmonary impairment. Pet. App. E4-E5. In this case, the ALJ credited a medical report, submitted by the employer, concluding that petitioner had no pulmonary disability, and he denied benefits on that basis. *Id.* at E5-E6.

The Department of Labor's Benefits Review Board vacated and remanded the case in light of the Seventh

Circuit's decision in *Wetherill* v. *Director, OWCP*, 812 F.2d 376 (1987). Pet. App. C1-C5. The Board read *Wetherill* to allow rebuttal under Section 727.203(b)(2) only if the claimant is not disabled at all, while leaving for resolution under Section 727.203(b)(3) the question whether, where the claimant is disabled, the presumption may be rebutted by pointing to another cause of the disability. Pet. App. C3. The Board noted its view that the *Wetherill* approach "conflicts with the intent of Congress to provide benefits under [the BLBA] for disability due to *pneumoconiosis*, not other disabling conditions." *Id.* at C3 n.2. Considering itself bound by *Wetherill* in cases arising in the Seventh Circuit, however, the Board remanded for reconsideration of the rebuttal evidence under its reading of *Wetherill*. *Id.* at C3.

On remand, the ALJ took additional medical evidence and awarded benefits. Pet. App. F1-F8. Given petitioner's "history of three back surgeries and a diagnosis of emphysema and heart disease," the ALJ concluded that petitioner was unable to do his usual coal mine work, and that accordingly the employer could not rebut the interim presumption under the interpretation of subsection (b)(2) required by the terms of the remand. *Id.* at F4. The ALJ then considered whether the employer had rebutted the presumption under subsection (b)(3) by proving "either that [petitioner] has no respiratory or pulmonary impairment or that such impairment is not causally related to his coal mine employment." Pet. App. F6. After considering the medical evidence, the ALJ found (*ibid.*) that petitioner "does have some chronic obstructive pulmonary disease * * * related both to coal dust exposure and [to] cigarette smoking," and that his "respiratory disease

causes some impairment which is a contributing factor of his total disability." *Id.* at F5-F7. Accordingly, the ALJ concluded (*id.* at F7) that the employer had not rebutted the presumption under subsection (b)(3). The Benefits Review Board affirmed. Pet. App. D1-D5.

3. The court of appeals reversed. Pet. App. A1-A11. Characterizing its discussion of subsection (b)(2) in *Wetherill* as dictum, the court adopted the Benefits Review Board's preferred interpretation that "when a miner has pneumoconiosis and is disabled, but not by the pneumoconiosis, rebuttal should be allowed under § 727.203(b)(2)." Pet. App. A7. To illustrate its point, the court posited the case of a miner who has non-disabling simple pneumoconiosis, but who becomes disabled when he loses a leg in a mine accident. *Id.* at A1, A3. Like petitioner, such a miner could invoke the interim presumption using x-ray evidence of his pneumoconiosis. 20 C.F.R. 727.203(a)(1); Pet. App. A3-A4. In the court's analysis, if Section 727.203(b) were read literally, the employer would be unable to rebut the presumption, because the miner would no longer be working (subsection (b)(1)), he would be unable to work (subsection (b)(2)), his disability would have arisen out of coal mine employment (the mine accident) (subsection (b)(3)), and he would have pneumoconiosis (subsection (b)(4)). Pet. App. A4.

The court of appeals rejected that result as inconsistent with the BLBA's goal of providing benefits for "total disability due to pneumoconiosis." Pet. App. A7. Thus, in the court's view, "[t]he better way to read subsection (b)(2) is as the [Benefits Review Board] initially read it: to say that the cross-reference [to 20 C.F.R. 410.412(a)(1)] invites us to consider not only the miner's ability to do his old job but also whether inability

to work is traceable to coal dust." Pet. App. A9-A10. Reading that cross-reference to incorporate Section 410.412's overall definition of "total disability due to pneumoconiosis," rather than merely its definition of "comparable and gainful work" (see Pet. App. A7-A8), the court held that an employer may rebut the presumption under subsection (b)(2) by showing that the claimant's condition, while disabling, is "*unrelated* to pulmonary problems." Pet. App. A11. The court concluded that any other result would "yield[] the conclusion that a miner who has simple pneumoconiosis, which would not interfere with his job in the slightest, receives black lung benefits if something else prevents him from working."[1] *Id.* at A6.

The court recognized (Pet. App. A10) that its interpretation of subsection (b)(2) "seems to create a conflict" with decisions of three other circuits. See Pet. App. A7 (citing *Sykes* v. *Director, OWCP*, 812 F.2d 890, 893-894 (4th Cir. 1987); *York* v. *Benefits Review Bd.*, 819 F.2d 134, 137 (6th Cir. 1987); and *Robbins* v. *Jim Walter Resources, Inc.*, 898 F.2d 1478, 1483 (11th Cir. 1990)). The court questioned, however, whether those courts would reach a different result if confronted with the facts of this case. Pet. App. A10-A11. As the court understood the facts, petitioner is totally disabled due to a mine injury, but he is not disabled by any respiratory or pulmonary ailment. Under those circumstances, the court held, "a disabling condition *unrelated* to pulmo-

---

[1] The court distinguished this case from what it regarded as more difficult cases in which a totally disabling respiratory or pulmonary impairment has multiple causes (such as coal dust and cigarette smoking), or in which total disability results from any of two or more independent conditions (such as disabling pneumoconiosis and a paralyzing stroke). Pet. App. A9-A10.

nary problems may overcome the interim presumption." *Id.* at A11. The court accordingly set aside the Board's order and reversed the award of benefits.[2]

## ARGUMENT

1. The court of appeals correctly held that a coal miner afflicted by non-disabling pneumoconiosis, but disabled by an unrelated condition, is not "totally disabled due to pneumoconiosis" within the meaning of the Black Lung Benefits Act. Pet. App. A1. The Act itself requires the Secretary's implementing regula-tions to provide that "a living miner * * * shall be considered totally disabled when *pneumoconiosis prevents* him or her from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity and over a substantial period of time." 30 U.S.C. 902(f)(1)(A) (emphasis added). Moreover, while the presumption and rebuttal provisions of 20 C.F.R. 727.203(a) and (b) were designed in part to ease the burden of proof for claimants, "no set of regulations * * * may provide that a claimant who is statutorily barred from recovery may nevertheless

---

[2] The Secretary of Labor is, by statute, a party to any proceeding relating to a claim for benefits under the BLBA. 30 U.S.C. 932(k). The Secretary has delegated that role to the Director of the Department of Labor's Office of Workers' Compensation Programs. See 20 C.F.R. 701.202(f), 802.410(b). The Director was therefore a party to the proceedings below, although she did not file a brief or otherwise participate in any of those proceedings. See, *e.g.*, Pet. App. C1, D1, E1, F1; C.A. Docket 1 (caption), 3 (order of Dec. 23, 1993, noting that matter would be submitted without briefing or argument by Department of Labor). Having been a party in the court of appeals, the Director is a respondent under this Court's Rule 12.4.

recover."[3] *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 691 (1991); cf. *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 158 (1987) ("if a miner is not actually suffering from the type of ailment with which Congress was concerned, there is no justification for presuming that that miner is entitled to benefits").

In this case there is no dispute that petitioner is totally disabled by reason of a mine-related back injury. Petitioner also produced evidence of simple pneumoconiosis, and by the time of the ALJ's second decision he had developed some degree of chronic bronchitis and emphysema. See Pet. App. A6, A11, F7. Although the court of appeals' opinion is not entirely clear, it appears to be based on the conclusion that petitioner's pneumoconiosis "would not [have] interfere[d] with his job in the slightest." *Id.* at A6; see also *id.* at A5-A6, A9, A11. The court's opinion thus stands only for the proposition that a miner "who could work despite his pneumoconiosis, and who is disabled by a condition unrelated to coal dust," is not entitled to benefits under the BLBA. *Id.* at A9. Moreover, even if petitioner's respiratory ailments do contribute to some extent to his total disability (see *id.* at F7), the ALJ did not find (and there is no indication in the record) that those conditions would be totally disabling in the absence of the back injury. See *id.* at A11, E4-E5, F4-F7. In either case, the Director agrees that a claimant who has no totally disabling respiratory or pulmonary impairment of any

---

[3] The Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, § 2(c), 92 Stat. 95-96, directed the Secretary to adopt interim criteria for evaluating benefit claims "not * * * more restrictive" than certain previously applicable regulations. See generally *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 110-111 (1988).

kind cannot be "totally disabled due to pneumoconiosis" within the meaning of the Act. Cf. *Jewell Smokeless Coal Corp.* v. *Street*, 42 F.3d 241 (4th Cir. 1994) (reaching same conclusion under permanent regulations).[4]

2. The court of appeals' analysis in this case resembles the Benefits Review Board's original interpretation of 20 C.F.R. 727.203(b)(2). See *Sykes* v. *Itman Coal Co.*, 2 Black Lung Rep. (MB) 1-1089 (Ben. Rev. Bd. 1980), rev'd *sub nom. Sykes* v. *Director, OWCP*, 812 F.2d 890 (4th Cir. 1987). That analysis relies in part on subsection (b)(2)'s cross-reference to the definition of total disability in 20 C.F.R. 410.412(a)(1), which in turn tracks the definition prescribed by 30 U.S.C. 902(f)(1)(A) (quoted at p. 7, *supra*).[5] Both definitions implement the

---

[4] As the court of appeals recognized (Pet. App. A8-A9), this case differs from cases in which a claimant suffers from two independent medical conditions, one respiratory and one non-respiratory, either of which alone would cause total disability; and from cases in which some normally non-compensable cause (such as cigarette smoking) may have contributed to a claimant's totally disabling respiratory condition. In the Director's view, any miner who is totally disabled by a respiratory impairment caused at least in part by coal mine employment is entitled to benefits under the Act, even if he is also totally disabled for some other reason, such as an accident or a stroke. *Twin Pines Coal Co.* v. *United States Dep't of Labor*, 854 F.2d 1212 (10th Cir. 1988) (mine accident); *Youghiogheny & Ohio Coal Co.* v. *McAngues*, 996 F.2d 130 (6th Cir. 1993) (auto accident), cert. denied, 114 S. Ct. 683 (1994); contra *Peabody Coal Co.* v. *Vigna*, 22 F.3d 1388 (7th Cir. 1994) (stroke).

[5] 20 C.F.R. 410.412(a)(1) provides that:

> (a) A miner shall be considered totally disabled due to pneumoconiosis if:
>
> (1) His pneumoconiosis prevents him from engaging in gainful work in the immediate area of his residence requiring the skills and abilities comparable to those of any work in a

Act's substantive command that benefits should be provided for "death or total disability *due to pneumoconiosis*." 30 U.S.C. 931(a), 932(a) (emphasis added); see also 30 U.S.C. 921(a). Because the Act compensates only total disability due to pneumoconiosis, and pneumoconiosis causes only respiratory disability, the absence of total respiratory disability establishes the absence of a compensable impairment. *Sykes*, 2 Black Lung Rep. at 1-1093 to 1-1094; Pet. App. A7-A10.

As the court of appeals recognized (Pet. App. A7, A10-A11), several other courts have held that an employer may rely on 20 C.F.R. 727.203(b)(2) to rebut a claimant's interim presumption only if no disability of any type prevents the miner from performing either his usual work or "comparable and gainful work." *Robbins* v. *Jim Walter Resources, Inc.*, 898 F.2d 1478, 1482-1483 (11th Cir. 1990); *Oravitz* v. *Director, OWCP*, 843 F.2d 738, 739-740 (3d Cir. 1988); *York* v. *Benefits Review Bd.*, 819 F.2d 134, 137 (6th Cir. 1987); *Sykes*, 812 F.2d at 893-894. The practical impact of that conflict in approach is not, however, altogether clear. Those courts that read subsection (b)(2) narrowly may permit rebuttal under subsection (b)(3) where a claimant's total disability is caused entirely by something other than a respiratory impairment, as well as where such an impairment is shown to be due entirely to factors other than coal mine employment. See *Sykes*, 812 F.2d at 894 (evidence of causation properly addressed under subsection (b)(3)); *Grigg* v. *Director, OWCP*, 28 F.3d 416, 418-419 (4th Cir. 1994) (showing that claimant suffers from no respiratory

---

mine or mines in which he previously engaged with some regularity and over a substantial period of time (that is, "comparable and gainful work" * * *).

or pulmonary impairment of any kind may be used to rebut under subsection (b)(3)); *Ramey* v. *Kentland Elkhorn Coal Corp.*, 755 F.2d 485, 486 n.3, 491-492 (6th Cir. 1985) (subsection (b)(3) may apply if "pneumoconiosis played no part in causing a miner's disability") (quoting *Gibas* v. *Saginaw Mining Co.*, 748 F.2d 1112, 1120 (6th Cir. 1984)); *Robbins* v. *Jim Walter Resources, Inc.*, 898 F.2d at 1483 & n.4, 1485; *Kertesz* v. *Crescent Hills Coal Co.*, 788 F.2d 158, 162 n.5 (3d Cir. 1986) (subsection (b)(3) may apply if evidence establishes non-respiratory cause for total disability).[6]

Thus, despite their varying approaches, the courts of appeals appear to have preserved either subsection (b)(2) or subsection (b)(3) as an avenue for rebuttal of the interim presumption in the case of claimants who are disabled solely as the result of a non-respiratory impairment. In this case, the court of appeals construed subsection (b)(2) broadly and subsection (b)(3) narrowly, avoiding reliance on the latter because petitioner's disabling back injury resulted from his coal mine employment. The same result could have been reached, however, by construing subsection (b)(2) narrowly and

---

[6] The Third Circuit has refused to allow an employer to rebut under subsection (b)(3) solely "by showing that a claimant has no respiratory or other impairment." *Cort* v. *Director, OWCP*, 996 F.2d 1549, 1551 (1993). *Cort*, however, involved no evidence of disability from any source other than pneumoconiosis, and its holding and analysis would not control a case that involved proof that a conceded disability arose from some source unrelated to any respiratory disability (or to coal mine employment). See *Grigg* v. *Director, OWCP*, 28 F.3d at 419 n.3 (*Cort*'s "primary concern was that [subsection] (b)(3) not become a battleground for relitigation of the miner's * * * disability" *vel non*); see also *Oravitz*, 843 F.2d at 740 n.3 (subsection (b)(3) not at issue because "no other cause of the impairment has been advanced").

subsection (b)(3) broadly, to allow rebuttal in cases where the miner's total disability is not a respiratory one. Petitioner concedes (Pet. 11 & n.2) that it might be "reasonable to construe [subsection] (b)(3) to limit the disability arising from coal mining employment to the subject matter of the Act, i.e. that related to pneumoconiosis." In any event, as the court of appeals observed (Pet. App. A10-A11), it is not clear that any other court of appeals would have granted benefits to a claimant on the facts as described in the opinion below.

3. This case involves interpretation of a regulation that applies to a diminishing pool of claims filed before April 1, 1980. The Director informs us that only about a thousand cases are pending under the interim regulations, and that only a small percentage of those cases are likely to involve claimants, like petitioner, with a disabling but non-respiratory mine injury and non-disabling pneumoconiosis. Compare *Mullins Coal*, 484 U.S. at 139 (noting that at the time review was granted in that case the interim regulations applied to some 10,000 pending claims). Under the permanent regulations applicable to more recent claims, a claimant must establish by affirmative evidence that he suffers from a totally disabling respiratory impairment. See 20 C.F.R. 718.204(c). As a result, the interpretive issue raised in this case by the rebuttal structure of the interim regulations will not recur under the permanent regulations. While the differing approaches adopted by the courts of appeals in interpreting Sections 727.203(b)(2) and (b)(3) might have warranted review by this Court if the issue had arisen earlier (in a case in which the outcome would likely have been affected), we do not believe that the question presented is of sufficient

recurring importance to merit review at this late stage of the interim regulatory regime.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
*Solicitor General*

THOMAS S. WILLIAMSON, JR.
*Solicitor of Labor*

ALLEN H. FELDMAN
*Associate Solicitor*

STEVEN J. MANDEL
*Deputy Associate Solicitor*

ELLEN L. BEARD
*Attorney*

MARCH 1995